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In the Supreme Court of the United States

OCTOBER TERM, 1976

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

BARBARA ROSS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DANIEL M. FRIEDMAN,
Acting Solicitor General,

BARBARA ALLEN BABCOCK,
Acting Assistant Attorney General,

HARRIET S. SHAPIRO,
Assistant to the Solicitor General,

ROBERT E. KOPP,
ROBERT S. GREENSPAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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The Solicitor General, on behalf of the Secretary of Housing and Urban Development and the other federal defendants, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-3a) is not reported. The opinion of the district court upon entering a preliminary injunction is reported at 396 F. Supp. 278 (App. C,

infra, pp. 6a-26a), and its opinion rendered in connection with entry of a final judgment is reported at 405 F. Supp. 831 (App. D, *infra*, pp. 27a-37a).

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 4a) was entered on October 6, 1976. On December 29, 1976, the Chief Justice extended the time within which to file a petition for a writ of certiorari to February 3, 1977. By order of January 26, 1977, the Chief Justice further extended the time within which to file the petition to March 5, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 12 U.S.C. (Supp. V) 1715z-1(f)(3) required the Secretary of Housing and Urban Development to establish an operating subsidy program.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the appendix to this petition (App. E, *infra*, pp. 38a-43a).

STATEMENT

1. Section 236 of the National Housing Act, as added, 82 Stat. 498, and amended, 12 U.S.C. (1970 ed. and Supp. V) 1715z-1, is designed to encourage private enterprise to develop rental and cooperative

housing for lower income families. To this end, the statute provides for three programs—the "interest reduction" (12 U.S.C. 1715z-1(a)), "deep subsidy" (12 U.S.C. (Supp. V) 1715z-1(f)(2)), and "operating subsidy" (12 U.S.C. (Supp. V) 1715z-1 (f)(3)) programs.[1] The operating subsidy program would provide for periodic payments, on behalf of tenants who pay more than 25 percent of their income in rent, to the owner of a qualifying housing project to offset increases in utility charges and local property taxes. The effect of such payments would be to reduce the amount by which the tenants rentals would otherwise have to be increased on account of such increased costs.

Like all other programs established under Section 236, the operating subsidy program would require the use of "contract authority". See *Train* v. *City of New York*, 420 U.S. 35, 39 n. 2. Congress first specifies the total dollar amount of contracts that may be undertaken for a given program ("authorized contract authority") and, by subsequent appropriation statutes, permits the Secretary to use specified amounts of that authorized contract authority ("released contract authority") for a given fiscal year or other specified period of time. From

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[1] The "interest-reduction" program provides assistance in paying the interest on a project mortgage, and the "deep subsidy" program permits very low income tenants to occupy units in a project by defraying their rental expense to the extent that it exceeds 25 percent of income.

time to time thereafter, Congress appropriates the funds necessary to satisfy contractual obligations entered into pursuant to released contract authority ("the liquidation funds").[2] Congress has not appropriated released contract authority for the Section 236 programs since 1972 (Pub. L. 92-383, 86 Stat. 540).

The released contract authority at the beginning of fiscal year 1976 was approximately $125 million.[3] It was estimated that operation of the deep subsidy program, which the Secretary was required to establish (12 U.S.C. (Supp. V) 1715z-1(f)(2)), would require the obligation of $50 million in that year alone. It was further estimated that the Secretary's commitments under the interest reduction program would require $74.8 million,[4] and that

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[2] Appropriated funds are supplemented by a special revolving fund ("the reserve fund"), consisting of payments from project owners to the Secretary of amounts collected in excess of "basic rental charges." See 12 U.S.C. (Supp. V) 1715z-1(g). Prior to August 1976, this fund could be used only for payment of operating subsidies; now it may be used for other housing programs as well. Pub. L. 94-378, 90 Stat. 1095, 1096. We are informed by the Secretary that as of December 31, 1976, the reserve fund contained approximately $54.4 million.

[3] The account given here of the Section 236 programs and related matters is set forth with supporting affidavits in the Secretary's application to this Court for a stay pending appeal in *Hills* v. *Underwood*, C.A. D.C., Nos. 76-1603 and 76-1650, which was granted on October 18, 1976. A copy of that stay application is being furnished to counsel for respondents.

[4] Although the interest reduction program was suspended in January 1973, outstanding commitments made prior

implementation of the operating subsidy program would cost an additional $53.7 million for that fiscal year. Thus the released contract authority was insufficient to cover both the outstanding commitments under the interest reduction program and implementation of the operating subsidy program. The Secretary decided to honor the outstanding commitments and not to establish the operating subsidy program.

2. Respondents are tenants of the Uplands Apartments, Baltimore, Maryland, a housing project that receives interest-reduction assistance pursuant to Section 236. They commenced this suit against the Secretary and others [5] in the United States District Court for the District of Maryland, requesting prospective implementation of an operating subsidy program for the project. On May 16, 1975, the district court certified a class comprised of all tenants at Uplands who would be benefited by payment of the subsidy and granted a preliminary injunction requiring the Secretary to make subsidy payments to the project (App. C, *infra*, pp. 6a, 11a, 25a-26a). On December 31, 1975, the district court granted a permanent injunction (App. D, *infra*, p. 37a).

In its two opinions, the district court reasoned that the Secretary could have made operating subsidy payments, in excess of the amount of released

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to that suspension were estimated to require utilization of $74.8 million in contract authority for fiscal year 1976 alone.

[5] The project owner, Community Services, Inc., other private persons, and other HUD officials were named as parties defendant (App. C, *infra*, p. 6a).

contract authority, from a special reserve fund (see note 2, *supra*), and therefore was required to make such payments by the statute (App. C, *infra*, pp. 19a-23a; App. D, *infra*, pp. 33a-37a). The court of appeals affirmed on the basis of the district court's opinions (App. A, *infra*, p. 3a).

REASONS FOR GRANTING THE PETITION

This case involves an important question of national housing policy that this Court should resolve. Implementation of the operating subsidy program would cost the federal government more than $50 million annually, and under the current statutory scheme those funds could be obtained only by diverting them from other housing programs that the Secretary has determined to be more efficient.[6] The question presented here has arisen in at least 30 cases,[7] has been

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[6] The only question involved here is whether available funds should be allocated to the operating subsidy program or to other Section 236 programs; the question is not whether appropriated funds will be spent. Thus, this case does not involve any claim that funds have been improperly impounded.

[7] *E.g.*, *Nellie Johnson, et al.* v. *Hills, et al.*, Civil Action No. N-76-979 (S.D. Fla., January 20, 1977); *Elmer Rush* v. *Mt. Nebo, Inc.*, Civil Action No. C 76-665A (N.D. Ga., filed April 14, 1976, dismissed September 21, 1976); *Malcolm Utz, et al.* v. *Department of Housing and Urban Development*, Civil Action No. C-1-76-272 (S.D. Ohio, July 21, 1976); *Emma Serrano, et al.* v. *Hills, et al.*, Civil Action No. 76-Civ-1665 (S.D. N.Y., filed April 9, 1976); *Dussault* v. *Hills*, Civil Action No. C-76-147 (D. N.H., May 28, 1976, preliminary injunction vacated January 3, 1977); *Phyllis Campbell, et al.* v. *Department of Housing and Urban Development, et al.*, Civil Action No. C-75-471 (N.D. Ohio, August 18, 1976);

litigated in two courts of appeals,[8] and presently is before two other courts of appeals.[9]

1. Nothing in the statute requires the Secretary to implement the operating subsidy program. The statutory language is permissive, not mandatory: the Secretary "is authorized to make, and contract to make" operating subsidy payments. 12 U.S.C. (Supp. V) 1715z-1(f)(3).[10] The District of Columbia Circuit has recognized that this language, as it applies to the interest-reduction program (12 U.S.C. 1715z-1(a)), conferred upon the Secretary discretion to decline to implement that program when she reasonably determined that its implementation

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Gertsch v. *Hills*, 414 F. Supp. 15 (D. Utah); *Parker Square Tenants Assn.* v. *Hills*, Civil Action No. 75-CV 577-W-3 (W.D. Mo., January 27, 1976); *Taunton Gardens Co.* v. *Hills*, 421 F. Supp. 524 (D. Mass.).

[8] In addition to the decision below, the issue was decided adversely to the Secretary in *Abrams* v. *Hills*, C.A. 9, No. 76-2095, decided December 1, 1976. The Solicitor General has authorized the filing of a petition for a writ of certiorari in *Abrams*.

[9] In *Underwood* v. *Hills*, C.A.D.C., Nos. 76-1603 and 76-1650 (appeals pending), the district court entered a nationwide order requiring retroactive payment of operating subsidies (414 F. Supp. 526). This Court stayed the district court order on October 18, 1976. In *Dubose* v. *Hills*, C.A. 2, No. 76-1607 (appeal pending), the district court ordered implementation of the operating subsidy program in Connecticut. The court of appeals stayed that order, and on February 22, 1977, this Court refused to vacate that stay.

[10] In contrast, the provision establishing the deep subsidy program states that the Secretary "shall make, and contract to make" deep subsidy payments. 12 U.S.C. (Supp. V) 1715z-1(f)(2).

would interfere with other housing goals. *Commonwealth of Pennsylvania* v. *Lynn*, 501 F. 2d 848 (C.A. D.C.). A similar conclusion is warranted here: the Secretary is vested with discretion to decide not to implement the operating subsidy program.

The Secretary did not abuse her discretion in making that decision. Congress has not released sufficient contract authority to permit both the payment of outstanding commitments under the interest-reduction program and implementation of the operating subsidy program (see pages 4-5, *supra*). The Secretary therefore was confronted with the necessity of choosing between those two alternatives. The Secretary concluded that she should honor her interest-reduction commitments.

Before the interest-reduction program was suspended in January 1973 (see *Commonwealth of Pennsylvania* v. *Lynn*, *supra*), the Secretary had represented to state and local authorities and private developers that she would assist certain planned housing projects under that program; those entities had relied upon her representations in proceeding with the planning and construction of such projects (Carla Hills Affidavit of December 29, 1975, pp. 2-5).[11] The Secretary's failure to use her limited contract authority to carry out these existing commitments to state and local authorities and private developers "would [have] create[d] chaotic conditions" and defeated their substantial, and justified, reliance (*id.* at 3).

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[11] This Affidavit is part of the record in this case.

In addition, the Secretary concluded that the decision to honor existing interest-reduction commitments would better serve the consistently expressed desire of Congress that Section 236 contract authority be utilized to increase housing production for low-income families:[12] the interest-reduction program, by reducing the effective cost of project mortgages, encourages the production of new housing for low-income families, whereas the operating subsidy program, which does no more than absorb a portion of the increased utility charges and local property taxes that otherwise would be passed on to tenants in the form of higher rentals, does nothing to stimulate further building.[13]

Moreover, the Secretary believed that the operating subsidy program would be excessively costly

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[12] H.R. Rep. No. 93-1139, 93d Cong., 2d Sess. 4 (1974); S. Rep. No. 93-1056, 93d Cong., 2d Sess. 6-8 (1974).

[13] The Secretary further determined that alternative programs would more efficiently achieve the aims of the operating subsidy program. For example, the "Section 8 set-aside program" (United States Housing Act of 1937, Section 8, as amended, 88 Stat. 653, 662, 42 U.S.C. (Supp. V) 1437f; 24 C.F.R. Part 886) provides rent assistance that eliminates the need for operating subsidies. The families in projects receiving the benefit of Section 8 assistance pay no more than twenty-five percent of their adjusted income toward rent. They would thus not be eligible for operating subsidies, which are payable only on behalf of tenants paying more than twenty-five percent of their income for rent. The Secretary advises us that Section 8 aid currently is being provided to 111,448 housing units and that existing contracts for Section 8 assistance require obligation of $158 million in contract authority.

to administer, since it would require constant recalculations not only of the actual and reasonable increases in utility costs and local taxes for each project but also of the subsidy levels for each tenant. This administrative burden would be shared by the project owners. Any increase in a project owner's administrative costs probably would eventually be passed on to all his tenants, not just those receiving the subsidy, in the form of higher rents. See 12 U.S.C. (Supp. V) 1715z-1(f)(1) and 1715z-1(e). Those increases could substantially offset any benefit tenants might otherwise experience from payment of the subsidy.

2. Contrary to the ruling of the court of appeals, the lack of available contract authority cannot be cured by making payments for operating subsidies out of the reserve fund created by 12 U.S.C. (Supp. V) 1715z-1(g). The level of expenditures for Section 236 programs always has been limited to the amount of released contract authority (see page 3, *supra*), as Congress presumably knew when it granted the Secretary authority to establish the operating subsidy program. Nothing suggests that Congress intended, by establishing the reserve fund, to create an exception to this rule. The fund is merely an ancillary source of liquidating funds.

Moreover, after two years of accumulation, the available money in the reserve fund is insufficient to implement the operating subsidy program for even

a single year.[14] The fact that the reserve fund is incapable of supporting a continuing program further indicates that the fund was not intended to be a statutory basis for paying operating subsidies without regard to limitations on contract authority.

The recent passage of Pub. L. 94-378, 90 Stat. 1095, 1096, further illustrates that the reserve fund is merely a liquidation fund for the payment of contracts entered into pursuant to released contract authority. That statute provides that as of October 1, 1976, the reserve fund "shall be available, in addition to the amounts appropriated herein, for the payments on contracts entered into pursuant to [Section 236 and other specified housing programs]."[15] By specifying that the reserve fund is available for "payments on contracts," the new law confirms that the release of contract authority is a prerequisite to utilization of the fund.

3. Even if the Secretary were to expend the entire reserve fund on the operating subsidy program, the

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[14] The Secretary estimates that implementation of the program would cost $53.7 million per year. As of December 31, 1976, there was approximately $54.4 million in the reserve fund, but some $18 million of that represented erroneous payments made by project owners. See the *Underwood* stay application, p. 6. The district court in *Underwood* held that the Secretary could refund the overpayments to the project owners; the plaintiffs in *Underwood* are challenging that holding on appeal.

[15] However, under an order of the District of Columbia Circuit, the Secretary is enjoined from making the fund available for any program other than the operating subsidy program pending the outcome of *Underwood* v. *Hills*, *supra*.

program could remain in effect for less than one year. Indeed, retroactive payments would exhaust the fund within one month.[16] Thus the consequence of implementing the program would be to incur substantial administrative costs, only to abandon the program a few months later.[17]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

BARBARA ALLEN BABCOCK,
Acting Assistant Attorney General.

HARRIET S. SHAPIRO,
Assistant to the Solicitor General.

ROBERT E. KOPP,
ROBERT S. GREENSPAN,
Attorneys.

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[16] See the *Underwood* stay application, p. 10 n. 8, p. 12. Although no retroactive payments are involved in this case, they are at issue in *Abrams* v. *Hills*, *supra* and *Underwood* v. *Hills*, *supra*.

[17] In order to implement the program, the Secretary would be required, *inter alia*, to evaluate each of the more than 400,000 units receiving Section 236 aid, and this evaluation would require more than 161 man-years of agency effort. See the *Underwood* stay application, pp. 14-15.